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In The

Supreme Court of the United States

NORMAL PARM, JR., ET AL.,

Petitioners,

v.

MARK SHUMATE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF EAST CARROLL PARISH, LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE*, WALKER COTTONWOOD FARMS, LLC, SUCCESSOR-IN-TITLE TO WALKER LANDS, INC., IN SUPPORT OF OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Walker Cottonwood Farms, LLC ("Walker"), is the owner of property in East Carroll Parish, Louisiana ("the Property"), on which Petitioners were arrested for trespassing while engaged in recreational pursuits on non-navigable water bodies. Walker has a significant interest in the determination of the issues presented in this case as those issues directly impact Walker's rights as owner to preserve, develop, and enjoy the Property.

Walker files this *amicus* brief to protect not only the decision of the Fifth Circuit Court of Appeals, but also the final Louisiana state court judgment that Walker obtained after nine years of state litigation, which reached a definitive determination of many of the factual and legal issues that underlie the Petition. *See Walker Lands, Inc. v. East Carroll Police Jury*, 871 So.2d 1258 (La. App. 2nd Cir. 2004), *writ denied*, 903 So.2d 442 (La. 2005), *reconsideration not considered*, 916 So.2d 127 (La. 2005) (the "State Court Proceeding"). [Pet. App. at 101] Petitioners and their supporters, including the Waterways Access

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. All parties consented to the filing of briefs of *amici curiae*.

Association, appearing in this Court as one of the *amici*, were the driving force in the State Court Proceeding, in which Louisiana's former Attorney General unsuccessfully asserted the rights of the public to enter and exploit Walker's Property. This federal case, therefore, has been in many respects a reprise of the State Court Proceeding, whose findings and judgment the Fifth Circuit properly respected and upheld in resolving the narrow, localized issues presented by Petitioners' appeal.

Should Petitioners and their *amici* succeed in obtaining the sweeping changes they seek in federal and state law, Walker, its Property, and countless other owners of Louisiana properties stand to suffer permanent and irreparable injury. Fundamental fairness calls for Walker, as the owner of the Property that Petitioners seek to use and exploit, to have the ability to defend its rights against the claims of these serial trespassers. No less an interest than that of persons to own and enjoy their private property, free of the unwanted interference of others, is at stake. Equally important, and similarly ignored by Petitioners, is the federal government's ability to define the limits of its jurisdiction over the navigable waters of America and to control and foster navigation free of matters that are left to the States to administer and control.

Moreover, having litigated the access right to this Property for over twelve years in Louisiana's state and federal courts, Walker is uniquely positioned to provide important facts about the Property and the

State Court Proceeding, as well as to supply relevant legal authority to assist in reviewing the Petition. Accordingly, Walker welcomes the opportunity to address this Court and to support the Fifth Circuit's decision, which found that Petitioners were on Walker's Property in clear violation of Louisiana law and that no federal law or policy supports their right to access or use any portion of the Property.

INTRODUCTION

The resolution of the Petition must rest in large measure on the factual findings and holdings in the State Court Proceeding, which litigated factual and legal issues concerning the very Property and addressed the same activities and arrests that are the subject of the Petition. The Fifth Circuit properly relied on the findings and legal conclusions made in this decision to reject Petitioners' claims under both Louisiana and federal law. Nothing in the decision below, or the State Court Proceeding, implicates either the federal policies or the interests of states other than Louisiana that Petitioners and their *amici* seek to inject into this action.

COUNTERSTATEMENT OF FACTS

Petitioners' primary arguments rest on the supposition that they seek to fish on some portion of the navigable Mississippi River. This inaccurate

assertion portrays Walker's Property and its non-navigable waters as being directly adjacent to the Mississippi River shipping channel and in continual communication with – and perhaps even part of – the Mississippi River. As found in the State Court Proceeding and in the courts below, these assertions are completely incorrect.

Petitioners were and have been arrested after refusing to leave Walker's Property while fishing on non-navigable lakes and temporarily flooded lands that are situated nearly 3½ miles from the Mississippi River in the extreme northeast corner of the state of Louisiana, far from any coastal or tidal waters of the Gulf of Mexico.[2] [Pet. App. at 104-06] As the Louisiana court recognized, this Property has been closed for public fishing at least since the 1960s. [Pet. App. 103; App. p. 8] Regardless of the ordinary levels of the Mississippi River, the shallow water bodies on the Property are not accessed or accessible by boating west from the Mississippi River's channel.

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[2] The Property at issue in this case lies between the levee constructed by the Corps of Engineers and the Mississippi River 3½ miles to the east. To the extent the Property is covered by ordinary seasonal flood waters, this temporary inundation is a direct result of the existence of the levee, which retains the waters on Walker's Property and does not permit them to spread farther westward, where they would inundate the homes, businesses, and properties of others, including Petitioners. Petitioners thus seek not only to enjoy the protection of the levee, but also, as a result of the location of the levee on Walker's Property, to subject the Property to untrammeled public uses, including fishing and even hunting.

Trespassers are able to access the Property only by road or by launching small boats into Bunch's Cutoff, and from there, by making their way – sometimes by disembarking from, walking alongside, and dragging their boats – through a man-made drainage ditch and sometimes over dry land into Lake Gassoway and the other lakes on the Property.[3] [Pet. App. 3] The topography of the Property does not change from year to year as Petitioners suggest in asserting that the "mighty Mississippi" chooses its path southward, bounded only by the levees. In reality, the Corps of Engineers ("Corps") maintains the Mississippi within its channel, and except in highly unusual

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[3] The Louisiana trial court findings, which were accepted by the Louisiana appellate court, included the following findings concerning this drainage ditch:

> The Court further finds that the outlet channel/drainage ditch is in fact a drainage ditch of Gassoway Lake, that has been altered by man and is not a navigable stream as perceived by the Civil Code. . . .
>
> [The ditch] makes a ninety degree angle at one point, due to materials placed by man. . . .
>
> During many times of the year, the ditch has insufficient water for the smallest of boats to travel from Bunch's Cutoff up through the ditch into Gassoway Lake. . . .
>
> [T]he amount of vegetation in the ditch prohibits traversal of this area during certain times of the year and even during high water, one would have to leave the banks of the ditch and cross private land and run along beside the ditch in order to gain access to Gassoway Lake.

[App. pp. 10, 13]

circumstances, has done so for decades. Based upon extensive expert testimony, the trial court in the State Court Proceeding found that the channel of the Mississippi last flowed over the location of what is now Walker's Property more than 100 years ago. [App. pp. 13-15]

The Louisiana Court of Appeal found that the area between Lake Gassoway and the Mississippi River, 3½ miles away, is "dry land." The water bodies on the Property remain landlocked most of the year and can serve no useful commercial purpose.[4] [Pet. App. at 104-06] As the Fifth Circuit's opinion observes, several buildings and 140-foot-tall trees are on the Property. [Pet. App. at 3] Walker farms the Property, and there are roads, airstrips, a concrete bridge, farm buildings, and hardwood forests, as well as lakes, ditches, and borrow pits on the Property. The Property's elevation reaches 125 feet above mean sea level. *See, e.g.*, Pet. App. 123 (USGS topographical map) and the most recent Corps of Engineers navigational map (1998), in Respondent's appendix.[5]

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[4] Under settled law, such sloughs, creeks, and ditches that connect with navigable streams are not thereby made navigable if not used as highways of commerce, and the navigation servitude is not applicable even if navigable waters back up into them. *Zunamon & Chicago Mill & Lumber Co. v. United States*, 221 Ct. Cl. 835, 1979 WL 10393 (Ct. Cl. 1979).

[5] Had the Fifth Circuit applied the "vegetation test" under 33 C.F.R. §329.11(a), these physical attributes of the Property easily would have established that it lies above the Mississippi River's "ordinary" high water mark, which limits federal

(Continued on following page)

Based on facts as found in the State Court Proceeding, the Property and water bodies on it are not part of the Mississippi River. Additionally, the Louisiana courts held that Walker owns the water bottoms and land on which Petitioners were arrested because under Louisiana law, the State owns the beds or bottoms of water bodies in a sovereign capacity only up to the ordinary low water stage, and evidence in the State Court Proceeding showed that the Property lies above the low water stage of the Mississippi River. [Pet. App. at 105 fn. 7, 115] Thus, the primary legal issue in the State Court Proceeding was whether the public, including Petitioners, could go onto Walker's privately-owned Property to fish, hunt, camp, and conduct other activities. The Louisiana courts decided that issue in Walker's favor:

> Gassoway Lake and surrounding lands between the lake and the river are sometimes flooded by the Mississippi River. Privately owned land does not become part of a navigable body of water when a nearby navigable body of water overflows its normal bed and temporarily covers the property. Gassoway Lake is landlocked and does not now lie in the bed of the Mississippi River, which is some three and one-half miles to the east;

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jurisdiction at the point on the river bank where there is a clear demarcation.

> likewise, it is not a channel of the river, since it is cut off from it.

[Pet. App. at 111]

Under controlling Louisiana law, non-navigable water bodies like those on Walker's Property are subject to the law governing dry land. *See* La. Civ. Code art. 506 cmt. d. [Pet. App. at 113] Louisiana courts hold that property lying between the river and the levee is not the "bank" of a navigable river. "[F]our to five miles distance [between the levee and a river] cannot, in my view be construed as being in proximity to the river." *State v. Barras*, 602 So. 2d 301, 304 (La. App. 3rd Cir. 1992), *aff'd*, 615 So. 2d 285 (La. 1993). And, even if the Property were deemed to be the "bank" of the Mississippi River, Louisiana law permits use of the river bank only for purposes of navigation, which do not include fishing and hunting. [Pet. App. 119-20 fn. 16]

Of direct importance to Petitioners' § 1983 action, the Louisiana appellate court ruled unequivocally:

> Walker Lands does, however, have a right to prevent its private property from being exploited. It has the same rights as all other owners of private property against a person or entity who invades its land and that is to enforce its rights as a private landowner through use of the trespass statutes, to seek specific damages against a person or entity or to ask for an injunction against a specific person or entity. . . . Owners of private property may forbid entry to anyone for purposes

> of hunting or fishing and the like. La. C.C. art. 3413.

[Pet. App. at 118-19] The Louisiana Supreme Court denied further review of this ruling. 903 So.2d 442 (La. 2005).

The State Court Proceeding that Walker litigated to finality thus settled the elements necessary to support dismissal of Petitioners' federal action challenging their arrest. The final decision (i) found the Property and its waterbodies to be non-navigable and private, (ii) held that temporary flooding by Mississippi River waters does not alter the character of the Property, (iii) acknowledged the absence of any right of use by the public for fishing, hunting, or other activities, and (iv) authorized the arrest of trespassers. This decision cannot be ignored or altered to serve the mission of Petitioners and their *amici* to create heretofore unknown rights under federal law. The Fifth Circuit properly rejected Petitioners' collateral assault on the holdings of the Louisiana courts. *See* 28 U.S.C. §1738; *Allen v. McCurry,* 449 U.S. 90 (1980); *A.L.T. Corp. v. Small Business Admin.,* 801 F.2d 1451 (5th Cir. 1986). *See also United States v. Harrell*, 926 F.2d 1036, 1044 (11th Cir. 1991) (applying Alabama law to deny fishermen access to non-navigable river tributary). Petitioners' arguments, which have attained even more hyperbolic proportions in this Court, should be rejected here as well.

SUMMARY OF ARGUMENT

The most obvious reason why certiorari should be denied in this case is that Petitioners were arrested on *non-navigable waters*.[6] Under the governing Louisiana law, this factual finding renders Walker's Property, including its non-navigable water bodies, private – even when temporarily inundated by waters from the Mississippi River. [Pet. App. at 114-15]

Consequently, Petitioners' refrain that they seek to protect the right to recreation in the navigable waters of the U.S., and that the courts below have struck an unprecedented blow to this right, is a hollow argument. The Fifth Circuit merely reiterated long-established law that the federal navigational servitude has never included recreational fishing. Indeed, no "recreational use exclusion" could possibly exist because the right to recreate on navigable federal waters has never been recognized; therefore, that right was not "excluded" from the activities that

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[6] Navigability is a factual issue. *See Indian Bayou Hunting Club, Inc. v. Taylor*, 261 So.2d 669, 671 (La. App. 3rd Cir. 1972) ("A test of the navigability of water bottoms is that those which are navigable in fact must be regarded as navigable in law. . . . "); *Trahan v. Teleflex, Inc.*, 922 So.2d 718, 722 (La. App. 3rd Cir. 2006) ("Navigability is a question of fact and must be proven."). The test for navigability utilized in the State Court Proceeding is similar to the test under federal law as set forth in *The Daniel Ball*, 77 U.S. 557 (1870). *See* Pet. App. 113. ("A body of water is navigable in fact if it is capable of being used for a commercial purpose over which trade or travel are or may be conducted in the customary modes of trade and travel.").

are authorized as "navigation," as it was never included.

As is easily gleaned from a reading of the Petition, each of Petitioners' federal law theories pertains to certain rights to use navigable waters located in a navigational channel used in commercial navigation. Therefore, even assuming there were a right protected by some constitutional, statutory, or common law theory to fish in navigable waters, such a right would be irrelevant here. Consequently, because the decision below does not involve *navigational* rights in *navigable* waters, Petitioners' arguments do not merit further consideration.

ARGUMENT

1. The public has no right to recreation on private property under the Privileges and Immunities Clause.

Section I of the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As in their arguments under other theories, Petitioners assert that the Privileges and Immunities Clause protects recreational fishing rights in navigable waters – a proposition that is not supported by the cases cited by Petitioners. Those cases need not concern the Court, however, because even if the Privileges and Immunities Clause protects fishing in certain parts of navigable rivers, the Fifth Circuit's prohibition to the public use of overflow

waters on private, non-navigable property would not conflict with the jurisprudence under the Privileges and Immunities Clause.

Petitioners' cited cases are simply not on point. Moreover, consistent with the Privileges and Immunities Clause, the holdings in many of Petitioners' cases place limitations on the public's rights. For example, *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855), cited as reaffirming the People's right of "use and ownership of the navigable waters and right to use the abundance of the fishery therein," holds that Maryland could impose forfeiture of a vessel harvesting oysters below the low-water mark of Chesapeake Bay; although the State held the property in trust for public rights, including fishery, the State could regulate exercise of those rights. *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), cited for the right of all citizens to "piscary (fishing) in the navigable waters of America," holds that the right to maintain oyster beds in "public rivers and bays" of New Jersey belongs to the owner of the soil under the water. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), cited for the constitutional privilege and federal "common" right of "travel, navigation, and fishing," noted, in *dicta,* only that the "right to use" navigable waters is protected by the Privileges and Immunities Clause. The right at issue in *The Slaughterhouse Cases*, to practice butchering without restriction, was not within the clause. Finally, *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1978), cited as reaffirming the constitutional right of navigation, held only that big game hunting was *not*

protected by the Privileges and Immunities Clause and that state game laws are constitutional.[7]

The Privileges and Immunities Clause has nothing to do with the right Petitioners ask this Court to create: the right to come upon and use the private property of a fellow citizen. Indeed, if anything, such a right would be antithetical to the right of every citizen, including Walker, "to acquire and possess property of every kind," a right enumerated in *The Slaughterhouse Cases*, 83 U.S. at 76, as protected by the Privileges and Immunities Clause.

2. The public has no right to recreation on private property under the Public Trust Doctrine.

Petitioners distort the Public Trust Doctrine by pulling isolated phrases from inapplicable judicial decisions. The Public Trust Doctrine holds only that upon admission to the Union by Act of April 14, 1812,[8] 2 Stat. 641, 642, Louisiana acquired sovereignty of

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[7] Although the Petition cites no authority for the right to hunt on navigable waters, Petitioners and others have, in fact, sought to use Walker's Property for hunting, an activity that could be encompassed within the right of "recreational use," which could be construed to encompass myriad activities.

[8] The water bodies on the Property did not exist in 1812. [Pet. App. at 7] Therefore, in addition to other reasons, Petitioners' arguments fail because even if the Property were navigable (it is not), Louisiana would not have acquired ownership through the Equal Footing Doctrine.

the *navigable* water bottoms in the state on equal footing with the original 13 states, limited only by "the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana v. United States*, 450 U.S. 544, 551 (1981). *See also Dardar v. Lafourche Realty Co.*, 985 F.2d 824 (5th Cir. 1993). Petitioners' reliance on the Public Trust Doctrine rests on a series of invalid premises: first, they incorrectly characterize the Property as Public Trust waters; second, they contend that the federal navigational servitude burdens the Property; and third, they assert that the federal navigational servitude would allow them to fish, hunt, and pursue other recreational activities on the Property.

The Public Trust Doctrine does not apply to Walker's non-navigable property. *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 479 (1988) (*citing Smith v. Maryland*); *Shively v. Bowlby,* 152 U.S. 1, 26 (1894). As the Fifth Circuit recognized, "The navigational servitude does not burden land that is only submerged when the river floods." [Pet. App. at 15 (*citing Oklahoma v. Texas*, 260 U.S. 606, 632 (1923); *United States v. Harrell*, 926 F.2d 1036, 1041-43 (11th Cir. 1991); *United States v. Claridge*, 416 F.2d 933, 934 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970))]

This rule derives from the principle that navigability for the purposes of the federal navigational servitude extends only to a river's "ordinary" high water mark as defined under 33 C.F.R. §329.11(a), under which federal jurisdiction ends at the clear

demarcation on the river bank between the river and the uplands – as seen by destruction of terrestrial vegetation, litter or debris, changes in the character of the soil, or similar characteristics. As shown by maps and photographs in evidence, this test places Walker's Property entirely above the "ordinary" high water mark and, therefore, outside the federal navigational servitude.[9]

Petitioners' argument for application of the federal navigational servitude over temporarily flooded property was refuted in *United States v. Harrell*, 926 F.2d 1036, which the Fifth Circuit cited with approval. [Pet. App. at 15, 16] In that case, similar to Petitioners' contentions, the Corps argued that the federal navigational servitude included Lewis Creek, a privately owned non-navigable tributary subject to overflow from the navigable Tombigbee River. Based on the Corps' assertion, a group of sportsmen claimed access to Lewis Creek during times of high water. The Eleventh Circuit soundly rejected the attempt to extend the federal navigational servitude over the temporarily submerged property:

> The definition of "ordinary high water mark" advanced by [the Proponent] would extend

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[9] Although the Fifth Circuit was not able to make a definitive determination of the federal high water mark on the Property, the court observed, based on available evidence, that "it is unlikely that it includes much of the Property." [Pet. App. 16 fn. 4 (*citing Harrell*, 926 F.2d at 1043)]

> the regulatory jurisdiction of the United States to *farmland and hardwood forests in these bottom lands* simply because the Tombigbee River periodically floods its banks during the winter and spring wet months. *To argue that the [U.S.] government's jurisdiction should extend laterally as much as three miles on either side of the Tombigbee River is ludicrous.*

Id. at 1043 (emphasis added). The court recognized that the Corps' proposed definition "would recognize no horizontal limits to the 'bed' of a navigable river in those areas where the banks are relatively low and flat. . . ." *Id.* As the *Harrell* court acknowledged, arguments for such a limitless federal servitude must be rejected – not only because unsupported by law but for obvious practical reasons as well.

If Walker's Property were subject to the federal navigational servitude, hundreds of thousands of acres of other privately-owned property in Louisiana also would suddenly be subject to recreational fishing, hunting, and "other uses." The property rights of any owner whose premises may be seasonally flooded would be threatened. Some of this property is residential, such that homeowners would be faced with strangers fishing and even hunting in their backyards. Shipping facilities and manufacturing plants on the banks of navigable rivers would be accessible to anyone carrying a fishing rod or rifle – with obvious security risks. The taxpayers would bear the brunt of funding the compensation that would be paid

for such "takings," while state and local jurisdictions could lose millions of dollars in property tax revenues.[10] Titles to all seasonally flooded property would be clouded, complicating real estate sale and loan transactions. Plainly, Petitioners' short-sighted arguments do not warrant such radical changes to fundamental principles of property law.

Moreover, even assuming that a navigational servitude were to apply, its imposition would be limited by *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which this Court held that the Corps' regulatory jurisdiction does not allow public access to privately-owned property incapable of use as a continuous highway of commerce. As the Court held in *Kaiser,* "while Kuapa Pond may be subject to regulation by the Corps of Engineers, . . . it does not follow that the pond is also subject to a public right of access." 444 U.S. at 172-73. Because the State Court Proceeding found Walker's Property incapable of serving any useful commercial navigation purpose, under *Kaiser*, there can be no public right of access even if the Property were subject to federal regulation.

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[10] Riparian owners face the risks of loss of valuable property due to natural changes in the river course; however, this risk does not include extensions of the navigational servitude to include recreational fishing and hunting. The navigational servitude cannot be extended without compensation to private landowners.

Finally, in addition to not providing public access to private property, the federal navigational servitude does not afford Petitioners with the right to fish, hunt, camp, or pursue similar activities. Such activities do not constitute navigation and, indeed, would interfere with navigation. While some cases recognize that the federal right of navigation encompasses federal interests such as flood control, these cases do not extend that interest to recreational fishing and hunting. None of the cases cited by Petitioners stand for the novel proposition that they are entitled to conduct recreational activities in all waters governed by the federal navigational servitude.[11] Indeed, the case law is to the contrary. *See Phillips Petroleum*, 484 U.S. at 482-84 (acknowledging that fishing is not related to navigability); *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) ("Although the rule on navigability has been at times liberalized, to our knowledge none of the authoritative cases has liberalized the rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would

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[11] The Petition's reliance on decisions that define the extent of private ownership rights in property burdened with the federal servitude for navigation, including the right to compensation in "takings" cases, misreads those decisions, which do not address the recreational rights Petitioners seek in property that is not burdened with the servitude. *See United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *Gibson v. United States*, 166 U.S. 269 (1897); *Coastal Petr. Co. v. United States*, 207 Ct. Cl. 701, 524 F.2d 1206 (Ct. Cl. 1975).

constitute navigability."). The Fifth Circuit did not create new law in following these cases.

The federal navigational servitude exists only by virtue of the Commerce Clause for the purpose of allowing the U.S. government to preserve "navigation in interstate commerce." *Kaiser,* 444 U.S. at 178; *Vaughn v. Vermillion*, 444 U.S. 206 (1979); *Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 832 (5th Cir. 1993). The right of the government in navigable waters is "limited to the control thereof for the purposes of navigation." *Port of Seattle v. Oregon & Washington R.R.*, 255 U.S. 56, 63 (1921). A federal navigational servitude may not arbitrarily destroy or impair the rights of riparian owners absent a real or substantial relation to control of navigation. *United States v. River Rouge Improv. Co.*, 269 U.S. 411, 419 (1926). The Fifth Circuit correctly followed this jurisprudence. [Pet. App. at 16-17]

3. Federal common law does not support public access to private, non-navigable property.

Failing a right to pursue their activities under constitutional, statutory, or regulatory law, Petitioners next assert a federal common law right to recreation on private water bodies under the "broad and flexible" common law right of navigation. Neither Petitioners nor their *amici*, however, cite any constitutional, statutory, or jurisprudential provision that would require the federal courts to make common law in contravention of specific state laws in an area that

is subject to regulation by the various states. The Fifth Circuit properly declined to create such law.

Contrary to Petitioners' contentions, the federal common law may not supplant state law in areas that are of no interest or concern to Congress. *See Danforth v. Minnesota*, 128 S.Ct. 1029, 1046 fn. 24 (U.S. 2008) (*citing Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts – so-called 'federal common law'"). Federal common law may be created only when state law would significantly conflict with "uniquely federal interests." *Boyle*, 487 U.S. at 508. The right to recreation on private, non-navigable property is not a uniquely federal interest. As the Fifth Circuit held after reviewing Petitioners' arguments under Louisiana and federal law, "In any event, as things now stand, the right to fish on public trust lands is governed by Louisiana law, and there is no reason for us to displace that law by adopting a federal rule of decision in this context." [Pet. App. at 18] This conclusion is eminently correct.

Petitioners argue that a federal common law right to hunt and fish on submerged riparian lands was found in cases such as *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931). *Silver Springs* is inapplicable because it involved a claim by riparian landowners to land beneath waters that met the

Daniel Ball navigability "commerce test." Petitioners' citation to *dicta* in other cases is equally unavailing. In *Lawton v. Steele*, 152 U.S. 133 (1894), which Petitioners cite for the alleged common law right to fish navigable waters, the Court held that a fisherman's constitutional rights were not violated by the State's confiscation of his fishing gear under fish and game laws. Similarly, *Scranton v. Wheeler*, 179 U.S. 141 (1900), held that no compensation was due a riparian owner whose access to a public, navigable river was obstructed by a pier constructed by the United States. Finally, *Kaiser Aetna*, 444 U.S. 164, holds only that Congress has authority under the Commerce Clause to legislate access to navigable waters, not that it must do so.

Petitioners' contention that the Fifth Circuit's holding is in conflict and may interfere with the laws of various states is not supported by the very authorities Petitioners cite. Indeed, because state law determines the rights of the public and private owners in non-navigable waters, federal law is not implicated at all. In particular, it is difficult to fathom how Louisiana's uniquely civilian law, derived from the laws of France, Spain, and ultimately, Rome, could impact the property and navigational laws of other states, which derive from the law of England. Petitioner's cited Louisiana case, *State v. Barras*, 615 So.2d 285 (La. 1993), held, consistent with the Fifth Circuit's reasoning, that there was no public right to crawfish on temporarily flooded, private swampland. The law of the other Fifth Circuit jurisdiction that Petitioners

cite, Mississippi, also is not threatened by the Fifth Circuit's holding. Exemplary of Petitioners' other cited cases, *Delinks v. McGowan*, 173 A.2d 488 (Conn. 1961), found only that a statute authorized the State to purchase property for public access to a navigable river. Significantly, however, the court recognized that "the upland owner has the right to prevent the public from crossing the private lands which border on these public domains and are above the high-water mark." *Id.* at 491. And, as recognized by the commentator the Petition cites, "Absent federal preemption under the commerce clause, states have been free to make their own navigability determinations of waters within their boundaries." *See* Comment: *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 Wyo. Law Rev. 561, 567 (2005). Clearly, what the Fifth Circuit decided with regard to Walker's Property, which is non-navigable and private under Louisiana law, has no practical or legal impact on the laws of other states.

4. Federal statutory law and regulations also do not support public access to private property.

Finally, Petitioners rely on several federal conservation and wildlife protection statutes that purportedly grant a federal right to hunt and fish. *See* Fish and Wildlife Coordination Act of 1985, 16 U.S.C. §§661-668; The Fish and Wildlife Act of 1956, 16 U.S.C. §§742a-742j; The Magnuson-Stevenson

Fisheries Management and Conservation Act of 1996, 16 U.S.C. §1801 *et seq.*; and the Clean Water Act, 33 U.S.C. §1251 *et seq*. Neither these statutes, nor any others, provide public access to the Walker Property.

While portions of some of the statutes Petitioners cite may promote, protect, or recognize the importance of recreational fishing, none of the statutes create, or even mention, the right Petitioners seek to go onto overflow waters located from time to time in the "shallows" on property owned by another for the purpose of pursuing recreational activities. As Petitioners correctly acknowledge, it is for Congress to decide whether it will regulate a particular sphere of activity. Tellingly, Congress enacted the laws Petitioners cite to protect natural resources, but Congress chose *not* to enact legislation providing access to privately-owned property for recreational hunting and fishing. As observed in *Kaiser Aetna*, 444 U.S. at 174, Congress's expansive authority under the Commerce Clause allows it to legislate access to specific *waters if it chooses to do so*. Therefore, the fact that Congress *chose not to speak* on the subject is consistent with the principle that public access and fishery rights may not be inferred from these statutes. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). Courts have a duty to refrain from reading a phrase into a statute when Congress has left it out. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993); *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 936 (11th Cir. 2000)

("[W]e should not be quick to conclude that Congress either neglected to consider an issue related to its enactments, or decided to avoid the issue and leave its resolution to the courts.").

Far from flouting Congress's plenary authority to legislate over navigable waters, the Fifth Circuit's decision recognized that its authority is limited to federal navigable waters where commercial navigation takes place. Petitioners cite no statute or decision evidencing that the Walker Property is used or usable for commercial navigation. The State Court Proceeding produced evidence that the Property was not capable of commercial navigation. Plainly, Petitioners have no federal right for this Court to enforce.

CONCLUSION

Petitioners ask the Court to make sweeping new law that whenever waters from navigable rivers cover the land between the Corps of Engineers levees, private property rights vanish, allowing unfettered public access to hunt, fish, trap, camp, and even commercially exploit private property. Such a determination would overrule centuries of state and federal law. The Fifth Circuit and the Louisiana courts correctly rejected this unwarranted extension of public access law and destruction of private property rights.

WHEREFORE, *amicus curiae* Walker Cottonwood Farms, LLC respectfully requests that this Court deny the Petition.

Respectfully submitted,

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WALKER LANDS, INC. AND HOLLYBROOK LAND COMPANY, INC.	SIXTH JUDICIAL DISTRICT COURT
VERSUS	PARISH OF EAST CARROLL
STATE OF LOUISIANA	STATE OF LOUISIANA
	NO. 17,746
FILED: MAY 1, 2003	s/ Charlotte B. Herrington DEPUTY CLERK

REASONS FOR JUDGEMENT

This matter came on for hearing before this Court as a result of a lawsuit filed originally by Walker Lands, Incorporated and Hollybrook Land Company, Incorporated, hereinafter referred to as Walker and Hollybrook or Plaintiffs, against the East Carroll Parish Police Jury. The State of Louisiana was later joined in the suit. The suit seeks an injunction against certain individuals from using the lake for certain activities including hunting, fishing, trapping, and for commercial, as well as for recreational pursuits. The plaintiffs assert that the property in question, an area in East Carroll Parish, which lies east of the levee adjacent to Highway 65, and includes an unnamed, unpaved road running from Highway 65 to Lake Gassoway, as well as the bed, bottoms, and waters of Lake Gassoway, and a ditch or outlet channel, along with certain other lakes is privately owned and not subject to any right of public access or use. The Attorney General issued an opinion on May 25, 1996, Opinion 26-906, which concluded

that "Lake Gassoway is a naturally navigable body of water under both State and Federal law and actually supports navigation for such purposes as hunting, fishing, trapping, and for limited commercial purposes" in addition to recreational purposes. The opinion further states that the Lake constitutes a navigable "highway of commerce."

On June 10, 1996, the plaintiffs filed the Injunctive suit which is the subject of this opinion. In support of their claims, Plaintiffs pleaded their titles to the Property and the Road and the absence of any right of public use over either the road or Lake Gassoway itself. Plaintiffs sought injunctive relief based upon the violation of their right to own private property and their constitutional rights to due process and equal protection.

On June 12, 1996, this Court issued a temporary restraining order prohibiting the Police Jury and all other persons or governmental agencies from removing the fences placed across plaintiffs' privately-owned roadways and from using such roads or other means of access to Lake Gassoway and from going upon or using Lake Gassoway and the ditch for any purpose, including boating, fishing, and hunting. This restraining order was extended by consent of all parties.

Following the filing of its Answer, the Police Jury filed a third-party demand against the State of Louisiana. This Court ruled that the State of Louisiana was an indispensable party to the suit based on the

alleged duty of the State to defend title to all public lands and any alleged rights of public access to, and use of, Lake Gassoway. On March 11, 1997, Plaintiffs filed an Amended and Supplemental Petition seeking a declaratory judgment declaring that 1) Plaintiffs are the owners of the Road; and 2) are the owners of the bed, bottoms, and waters of Lake Gassoway and of the surrounding land as described in its title. Plaintiffs' Amended and Supplemental Petition also sought a judgment declaring and confirming that certain definitive judgments entered in 1918, 1963, and 1967, which adjudicated the ownership and title to the property at issue to private owners, have *res judicata* effect, and that the Road and the Lake are not subject to any right of public use or to express or tacit public dedication. On October 13, 1997, Plaintiffs joined the State as a direct Defendant, asserting the same claims and demanding the same relief against the State as against the Police Jury.

Upon the filing, briefing, and hearing of three motions for summary judgment filed by Plaintiffs, this Court ruled in favor of Walker and Hollybrook on March 16, 1998, and granted Plaintiffs' request for an injunction. The State appealed this judgment. The Second Circuit Court of Appeal reversed this Court's decision on the summary judgment motions and remanded the case, finding that summary judgment was not an appropriate vehicle to establish the issues of this case. Plaintiffs' application for review was denied by the Louisiana Supreme Court. The

injunction's continued validity was confirmed by this Court by Order of September 24, 1999.

The State in its Answers denied that the bed, bottoms, and waters of Lake Gassoway are free and clear from public use and denied that the Lake was privately owned, but only "to the extent" such ownership was "contrary to the provisions of La. R. S. 9:1101." On October 29, 1999, the State filed a Motion for Leave to File a Supplemental and Amending Answer and Reconventional Demand, alleging that the State owns all running waters in Lake Gassoway and in a number of other lakes, and that the State owns unnamed islands and bars "not attached to the bank at the time of formation and formed in the beds" of the Mississippi River "in the vicinity of the dispute."

The State also claimed ownership or servitudes to Little Gassoway, Doe Lake, Mud Lake, Lost Lake, Snag Lake, and any other lakes or water bodies on the Property (collectively "the other lakes"). In addition, the State claimed Gin Lake and Little Snag Lake, although they are located in Arkansas. The State claims Snag Lake in its entirety, although the State line runs through Snag Lake and only a portion of the southern part is in Louisiana. The State's Motion for Leave was heard on December 30, 1999. This Court denied the State's motion, but because Plaintiffs had claimed possession and ownership, the Court allowed the State, over Plaintiffs' objections, to present any evidence it desired to prove the issues

raised in the State's proposed, but unfiled, amended answer.

The original defendant, the Police Jury, in its defense to Plaintiffs' claims, asserted that the Road was publicly owned and/or impliedly or tacitly dedicated to the public as a result of alleged construction and maintenance of the Road by the Police Jury. By Judgment of September 27, 2000, the Police Jury dismissed all its claims to the Road, and this Court confirmed that the Road was privately owned and maintained. The Police Jury also dismissed its third-party demand against the State. Thus, the issue of the ownership of the Road was resolved in favor of Hollybrook and Walker prior to trial by this Court's Judgment confirming the private ownership of the Road. Therefore, the ownership of the Road was not considered at the trial. Hollybrook's dismissal was confirmed by Judgment dated September 25, 2001, which Judgment fully reserved Walker's rights to pursue all of its claims.[1]

The case was tried on January 10-14, 1999 [sic], and on January 24-27, 1999 [sic], when it was adjourned due to a severe snowstorm. Trial resumed on September 24, 2001, and was completed on September 26, 2001. A total of 40 witnesses testified at the trial, producing a transcript of 2,115 pages. A total of

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[1] Since Hollybrook Land Company, Incorporated, had been dismissed as of September 25, 2002 [sic], Walker Lands, Incorporated, will be referred to as Walker or Plaintiff.

240 exhibits were introduced. This Court allowed the State to raise all issues and introduce any evidence it thought to be helpful to its position. As this Court stated at trial, the Court has received extensive evidence. In addition, as part of the trial, this Court made a site visit to the Property together with representatives of the State and Walker on March 9, 2000, and again on February 8, 2002. On the date of the first site visit, the elevation of the Mississippi River was 97.6 feet, NGVD, and 24.6 on the Vicksburg gauge. On the date of the second site visit, the stage elevation of the Mississippi River on the Vicksburg gauge was 36.2, which is equivalent of an elevation of 109.2, NGVD.

Both the Plaintiff and the Defendant agree that in 1812 when Louisiana was admitted to the Union, Lake Gassoway was not in existence, but was either woods or farm land. The parties agree that the area of dispute was patented to private owners during the 1830's. The parties agreed that the patents were properly issued and the tax records indicate that taxes on the property in question have been paid by private owners. During a period of time between the 1860's and 1870's the Mississippi River system began moving in a westernly direction toward the geographical site now occupied by Gassoway Lake. When the witnesses from the Louisiana State Land Office were called by Plaintiffs at the beginning of the trial, they declared that their department has not made any claims that the State owns any of the lakes or lands on the property in question in its sovereign capacity.

The private owners presented proof that they have been in corporeal and civil possession of the Property, as shown by the conveyance and mortgage records of the Parish of East Carroll and by the testimony of the witnesses. Under La. Code Civ. Proc. art. 3653, Plaintiff had to show only that it has "better" title. Plaintiff has proven that it has title and that Plaintiff and its predecessors-in-title have possessed the Property. Non-navigable lakes on property are subject to the law governing dry land. La. Civ. Code. art. 506, comment (d). Lakes, therefore, need not be described separately in titles.

Before Walker acquired the Property in 1974, it was used and maintained by private predecessors-in-title. Prior to 1960, the Property was farmed, used for cattle grazing, and for other purposes, as established by testimony of Mr. Robert Amacker, Jr., which owned and acquired increasingly larger sections of the Property since the early 1900's. Documents filed in the public records establish that all of Walker's predecessors-in-title used the Property to its fullest extent. The Property records show the inscriptions of timber leases and deeds, farm leases, tax sales, mortgages, title disputes among private owners, and grants of railroad, highway and levee servitudes.

It was not uncommon at that time, prior to the late 1950's the then-owners did not prohibit people from fishing on the Lake. However, the owners at all times exercised their ownership interests and dominion over the Property and defended their title. (Pl. Exh. 10). In the 1940's and prior to the late 1950's, an

ungraveled, unpaved, mud ramp provided access to the lake from Highway 65, and the owners did not prohibit access over this muddy ramp, when it was passable. Since 1960, however, the owners and their lessees have prohibited access other than upon their terms, such as by imposing a fee. They built and maintained a fence around the Property.

Mr. James Shepherd was 80 years of age when he testified at trial. He had lived in the immediate vicinity of Lake Gassoway from 1954 until 1980 and testified that he and others knew that the lake was privately owned. The Nyanza Hunting Club obtained a lease on the Property in 1960. Mr. Shepherd was the President of the Club. The Club graveled and graded the mud ramp leading from Highway 65 to the lake and also maintained it. The Club also graded a boat launch on the western shore of Lake Gassoway in Section 15 so patrons who paid a fee could launch their boat. Fees were charged by the club to fish on the Lake and collected at a bait stand on behalf of the Club. These fees varied depending upon whether one fished standing on the shore of the Lake, launched one's own boat, or rented a boat. State witnesses confirmed that they paid a fee to access the Lake: "[t]he little house there where you go through the gate and you pay your fee right there,"; "[w]here you went in at that little store they had there where the gate is -- that little store – they charged $2.00 to launch the boat." One of the State's fishermen witnesses, Mr. Jerry Anderson, not only admitted that he had paid for access to the Lake in the past, but also

that he was a member of the Walker fishing club as late as 1998, well after the filing of this lawsuit, and that he paid Walker for the right to fish. Nevertheless, Mr. Anderson claimed that the Lake is public.

Mr. Shepherd testified that the Property was fenced and posted. The Club continued to lease and maintain the Property, and charge fees for access to the Lake, until Walker acquired the Property, the rental of boats continued until the mid 1980's. Walker employees kept the property posted and removed trespassers from the Property. State witnesses acknowledged that the Property was posted. Some of the State witnesses admitted that they had been arrested for trespassing more than once. "I knew the landowners did not want me there."

Walker presented the testimony of Sam House, who was the Sheriff of East Carroll Parish from July 1, 1968 to July 1, 1980, and Earl Fortenberry, both of whom were members of the Club. They testified that the Club restricted access to the Property to its own members for hunting, fishing and other purposes, and allowed access to Lake Gassoway by non-members only for the purpose of fishing, but not hunting, for a fee, the proceeds of which were used to build and maintain roads and the ramp. Others, including those who attempted to enter the Lake through the ditch, were considered trespassers and were asked to leave, or, if they did not leave, were arrested. Walker presented the testimony of 72 year old Reverend Arthur L. Thomas, a member of the Police Jury from 1974 to 1993, who has lived in the area all his life and

testified that it was generally known that Hollybrook owned the Property and that his constituents did not complain about the Lake not being accessible. Judge Charles Brackin, who lived most of his adult life in the area, testified that, when still in private practice, he handled the sale of the Property to Walker. He also confirmed the private nature of the Property. "Gassoway was a privately owned lake . . . [The fact that the waters came in from the Mississippi River did not in my opinion . . . change [the private] character [of Lake Gassoway.]"

As to the testimony received by the Court as it relates to various fisherman fishing in Gassoway Lake over various periods of time, the Court finds that those fishermen generally recalled paying a fee to launch their boats at Gassoway Lake at the end of the dirt road from US 65 over the levee to the lake. Those fishermen who fished Gassoway Lake by coming in through the outlet channel and/slash [sic] ditch at the bottom of the south end of Gassoway Lake recall encountering various obstacles in entering the Lake through that means. Thusly, the Court does not find that the testimony of these individuals who testified concerning fishing in the Lake in any way reflect upon whether Gassoway Lake is a navigable stream. The Court further finds that the outlet channel/ditch is in fact a drainage ditch of Gassoway Lake, that it has been altered by man and is not a navigable stream as perceived by the Civil Code in defining a navigable stream. Captain Disler was offered by the State as an expert and the Court

viewed and read his deposition even though the Court felt at times he expressed his views outside his expertise as a navigator. Captain Disler, in his video and deposition, testified as to the navigability of the outlet ditch. On the date Captain Disler visited the Lake Gassoway area, the river was at the same level of 24.6, Vicksburg gauge, as when the Court visited the lake and the ditch on March 9, 2000. The Court will note that Captain Disler never made it in his boat all the way into Gassoway Lake, but relied on the declaration of some local fisherman that they had gone all the way into the lake from the Rock Pile near Buncnes Cutoff. On March 9, 2000, when the river was at 24.6, Vicksburg gauge, the Court viewed the lake and the drainage ditch and observed that the ditch could not be considered navigable. The observations and opinions of the Court as to the navigability by Captain Disler simply did not exist to the view of this Court when it observed the lake and the ditch at the same level as when Captain Disler viewed the ditch and observed the lake from an aerial view in a plane.

The Court heard from several experts concerning the formation of Gassoway Lake. All of the experts testified that Gassoway Lake was not in existence in 1812, when Louisiana joined the Union and is thusly not controlled by the law that the State owns the beds of all rivers and lakes in existence at the time Louisiana became a State. Dr. Kemp testified to his theory of the creation of Gassoway was a result of a chute cutoff as contemplated by article 503 of the Civil

Code. The Court does not find that the evidence and maps support the position of Dr. Kemp that the lake was created as a result of a chute being silted at one end. Both Dr. Kesel and Dr. Kemp, experts called by the Plaintiffs' [sic] and Defense, respectively, agree that the lake was fully formed at the latest by 1908, however, based on a map supplied by the State, Dr. Kesel testified that the Lake was formed by 1894. All the experts further agreed that the lake was not formed as a result of an avulsion or neck cut off, which is the creation of an oxbow type lake, which is common along the Mississippi River

The Court carefully listened throughout the trial to all the experts and their theories on how Gassoway Lake was formed. The Court considered their educational backgrounds, their knowledge, their hands on training, their testimony as it related and interacted with the testimony of lay witnesses and persons who were knowledgeable of the area. The Court also considered their manner and demeanor while on stand, the assertiveness which they had in expressing their views, and the likelihood or probability of their testimony being accurate as it relates to all other evidence presented at the trial. The Court also considered their studies of the Mississippi River and knowledge of the river whether in the upper river (Lake Providence) or lower river (South Old River.) In considering and weighing all of this expert testimony as it relates to the forty witnesses who were called to testify, and considering the 240 exhibits which were introduced, which resulted in a transcript of 2,115

pages, the Court is firmly convinced that Dr. Kesel's opinion as to the formation of Gassoway Lake is a correct recitation of how Gassoway Lake was formed.

Examples as to why the ditch is not a navigable stream is that the ditch has been altered by man in that it makes a ninety degree angle at one point, due to materials placed by man, which causes the ninety degree turn. During many times of the year, the ditch has insufficient water for the smallest of boats to travel from Bunch's Cutoff up through the ditch into Gassoway Lake. There are man made objects, such as the lip which was man made, that prohibits the passage of this body of water during certain times of the year. The Court has also noted that the amount of vegetation in the ditch prohibits traversal of this area during certain times of the year and even during high water, one would have to leave the banks of the ditch and cross private land and run along beside the ditch in order to gain access to Gassoway Lake. Also, the fact that even though the ditch serves as a drain for the lake into a navigable waterway, Bunch's Cutoff, that does not make the drainage ditch from the lake a navigable stream.

Dr. Kesel convinced the Court that Lake Gassoway was not formed as a result of a chute cutoff, as speculated by Dr. Kemp, but the lake was created when the Mississippi river moved slowly and imperceptibly back eastward, which caused through accretion growing from the banks and closing what is now Gassoway Lake in the area which was previously farmland. The Court will note that Gassoway Lake is

a very shallow lake, ranging from four feet deep at low water to twelve feet in high water, which has not changed since it's [sic] formation and that the depth of the lake as compared to the depth of the Mississippi channel indicates that it was not a channel of the Mississippi River. Today, the channel of the Mississippi River is approximately three and a half miles east of Gassoway Lake, which again indicates that the Mississippi River, during the 1860's and 1870's, moved slowly and imperceptibly westwardly, washing away the west bank of the river. A map which was supplied by the State to Dr. Kesel indicates that the Mississippi River in the 1880's again imperceptibly began to move in a southeastwardly direction from whence it has previously come and left behind a swale, which was then, due to accretion, left a landlocked swale. According to the 1894 map it shows that Gassoway Lake was fully formed as a shallow swale, having been created by the slow movement of the Mississippi River back eastward from the same direction which it had come from in the 1860's and 1870's, forming Gassoway Lake on the land which was previously farmland and timberland. As it relates to Dr. Kemp's position that Gassoway Lake was formed as a result of a chute cutoff, whereby the ends of the chute would silt and close, the Court was not convinced that there was any evidence, maps, or otherwise, to support the position that a chute cutoff created Gassoway Lake. There was no credible evidence presented at trial that any accretion which formed on the bank was ever cut off at the location of Gassoway Lake or that the river ever opened a new channel at the location. The Court

further finds that the outlet channel/ditch is in fact a drainage ditch of Gassoway Lake, that it has been altered by man and is not a navigable stream as perceived by the Civil Code in defining a navigable stream. The Court further finds that Dr. Kesel's testimony regarding the other lakes is likewise credible and convincing and the lakes are land locked lakes, subject to private ownership.

As it relates to the position of the State that the public has a right to access Gassoway Lake during flood waters because it becomes a stream or channel of the Mississippi River is erroneous. Just because flood waters from a navigable stream cause private property to become accessible by boat from the navigable stream does not allow public access to that private property. The lake bed, the drainage ditch from the lake are all private property and therefore are not accessible to the public during high water or flood water.

The evidence clearly showed but for the actions of man, ie [sic] landowners, Gassoway Lake would virtually be non-existent during the low water of the Mississippi and during the drought months of the summer. The structures, such as the rocks, ninety degree turn, and other man made structures keep the lake from completely draining when no water is incoming.

Further support of the fact that Gassoway Lake is privately owned, the Court looks to the reports and testimony of the State Land Office, an agency of the defendant, State of Louisiana, who is charged with

the management of publicly owned property. The State Land Office does not lay claim to Gassoway Lake and that Gassoway Lake is landlocked and inaccessible by boat.

The State attempted to show that it owns the lake and it's [sic] waters pursuant to the provision of Louisiana Revised Statute 9:1101, which provides that the beds and waters of lakes not under the direct ownership of any person on August 12, 1910, were declared to be property of the State. The testimony and evidence received in the case that the predecessors in title to the land in question were in private ownership of the land in question on August 12, 1910. Also, the statute indicates that acquisition of property under Revised Statute 9:1101 does not affect acquisition of property by alluvion or accretion and that it was specifically testified to by Dr. Kesel that alluvion or accretion was involved in the creation of Gassoway Lake.

Although the Court finds that Gassoway is not a publicly owned body of water and is privately owned and that the ditch is not a navigable stream, the Court further notes that this particular tract of land has been in litigation before and previous courts have ruled that this land was subject to private ownership. Judgments of 1911, 1918, 1963, and 1967 support the position that the lands at issue had been adjudicated to Plaintiff and it's [sic] predecessors in title against the State and Fifth Louisiana Levee District. (Plaintiff's exhibits 75, 76, 77, and 78).

Therefore, this Court finds that the land subject to this lawsuit is privately owned by the Plaintiffs, that the lake and ditch are not navigable by law, that the State has never claimed this land in the past, and cannot do so now, that these matters have been litigated before and the Supreme Court affirmed that this land was subject to private ownership. Therefore, the Court finds that the Plaintiff has met its burden of proof and grants a judgment in favor of Plaintiff and the Court enters a permanent injunction enjoining the State or the general public from going on or about property subject to this litigation, which includes Gassoway Lake and the drainage ditch which runs from Bunch's Cutoff northward into the Gassoway Lake. Court will maintain jurisdiction of this case to enforce any provisions of a judgement which will be signed by this Court on proper presentation.

s/ John R. Joyce
JUDGE
AD HOC 6th JUDICIAL DISTRICT